

NO. 42921-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RONNIE DEAN STRODE, JR.,

Appellant.

BRIEF OF RESPONDENT

**SEAN BRITTAIN
WSBA # 36804
Deputy Prosecutor
for Respondent**

**Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080**

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
I. ISSUE.....	1
II. SHORT ANSWER.....	1
III. STATEMENT OF FACTS.....	1
IV. ARGUMENT.....	4
A. THE APPELLANT DID NOT OBJECT TO THE ADMISSION OF THE TROOPER'S OBSERVATIONS OF THE STRAW AND MIRROR INTO EVIDENCE UNDER ER 404(b); THEREORE, THIS ISSUE WAS NOT PROPERLY PRESERVED FOR REVIEW.	4
B. THE APPELLANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL.	5
V. CONCLUSION	8

TABLE OF AUTHORITIES

	Page
 Cases	
<i>State v. Fredrick</i> , 45 Wn. App. 530, 729 P.2d 56 (1986)	4
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	4
<i>State v. Jordan</i> , 39 Wn. App. 530, 694 P.2d 47 (1985), <i>cert. den'd</i> , 479 U.S. 1039, 107 S.Ct. 895, 93 L.Ed.2d 847 (1987).....	4
<i>State v. Kendrick</i> , 47 Wn. App. 620, 736 P.2d 1039 (1987).....	4
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	4
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	4
<i>State v. Pogue</i> , 104 Wn. App. 981, 17 P.3d 1272 (2001).....	5
<i>State v. Tharp</i> , 27 Wn. App. 198, 616 P.2d 693 (1980)	6
<i>State v. Tolias</i> , 135 Wn.2d 133, 954 P.2d 907 (1998)	4
 Other Authorities	
<i>McCormick's Evidence</i> § 190, at 448 (Edward W. Cleary gen. ed., 2d ed. 1972).....	6
 Rules	
ER 404(b).....	i, 1, 4, 5, 6, 8

I. ISSUE

1. Did the Appellant object to the admission of the trooper's observations of the straw and mirror into evidence under ER 404(b), thereby preserving the issue for appeal?
2. Was the Appellant denied his right to a fair trial?

II. SHORT ANSWER

1. **No.** The Appellant did not object under ER 404(b); therefore, the issue is not properly before the Court.
2. **No.** The Appellant was not denied his right to a fair trial.

III. STATEMENT OF FACTS

On the evening of May 14, 2010, Trooper Gary Lane of the Washington State Patrol was on duty in Cowlitz County, Washington. 2A RP at 175. Trooper Lane came into contact with Ronnie D. Strode, the Appellant, after observing the Appellant's license plate light functioning improperly and a cracked taillight lens. 2A RP at 175-76. Trooper Lane initiated a traffic stop and contacted the Appellant in the Flying K parking lot. 2A RP 176. During the course of the traffic stop, Trooper Lane learned the Appellant's driver's license was suspended in the third degree. 1RP at 8. The Appellant was informed of his *Miranda* warnings and placed under arrest. 1RP at 9; 2A RP at 177; 2A RP at 194.

Upon performing a search pursuant to arrest, Trooper Lane located four prescription pill bottles on the Appellant's person. Three of the pill bottles were in the Appellant's name, while the fourth pill bottle, which contained Oxycodone, had the name Keith Coury. 1RP at 9-10; 2A RP at 196-97. Upon questioning, the Appellant told the Trooper Lane that Mr. Coury's pill bottle was on his person because he didn't want anybody to steal it. 2A RP at 200. The trooper continued his search of the Appellant's person and located a black straw that was cut to approximately two inches long. 2A RP at 200. Inside of the straw was a white residue. 2A RP at 200.

Trooper Lane then advised the Appellant of his *Ferrier* warnings and asked for consent to search his vehicle. 1RP at 12; 2A RP at 200. The Appellant consented to the search. 1RP at 12; 2A RP at 200. On the passenger side floorboard, Trooper Lane located a mirror, which had cut lines and white powder on the lines. 2A RP at 202. Based upon his training and experience, Trooper Lane recognized the straw and mirror as items people use to snort drugs. 2A RP at 202. Trooper Lane re-contacted the Appellant and questioned him about the additional items he had located. The Appellant told Trooper Lane that "he knows that he is taking more pills than he should" and that "he is addicted to them." 2A RP at 203-4.

The Appellant was taken to the Cowlitz County Jail and booked for Violation of the Uniform Controlled Substances Act -- Possession and Driving While License Suspended in the Third Degree. On May 18, 2010, the Cowlitz County Prosecutor's Office filed an information charging the Appellant with Violation of the Uniform Controlled Substances Act -- Possession of Oxycontin and Driving While License Suspended in the Third Degree. CP 1-2. On December 12, 2011, prior to the start of the jury trial, the State filed an amended information charging the Appellant with Violation of the Uniform Controlled Substances Act -- Possession of Oxycodone. CP 45-46.

The Appellant filed a motion in limine seeking to exclude Trooper Lane from testifying about his observations of the straw and the mirror. 1RP at 126-141. The Appellant argued that this testimony was irrelevant and prejudicial. 1RP at 134. The State argued that this evidence was relevant to rebut the Appellant's affirmative defense of unwitting possession. 1RP at 134-36. The trial court denied the Appellant's motion in limine, concluding that the testimony was relevant and it would be up to the jury to determine what weight should be given. 1RP at 141. The jury found the Appellant guilty. The Appellant was sentenced to 21 days of jail. CP 71. A timely notice of appeal was filed. CP 78.

IV. ARGUMENT

A. THE APPELLANT DID NOT OBJECT TO THE ADMISSION OF THE TROOPER'S OBSERVATIONS OF THE STRAW AND MIRROR INTO EVIDENCE UNDER ER 404(b); THEREFORE, THIS ISSUE WAS NOT PROPERLY PRESERVED FOR REVIEW.

“A party may assign evidentiary error on appeal only on a specific ground made at trial.” *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)(citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)). “The general rule is that appellate courts will not consider issues raised for the first time on appeal.” *Kirkman*, 159 Wn.2d at 926; *See also* RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995). An evidentiary objections based upon relevance does not preserve ER 404(b) review. *State v. Kendrick*, 47 Wn. App. 620, 634, 736 P.2d 1039 (1987) (citing *State v. Fredrick*, 45 Wn. App. 530, 539, 729 P.2d 56 (1986); *State v. Jordan*, 39 Wn. App. 530, 539, 694 P.2d 47 (1985), *cert. den'd*, 479 U.S. 1039, 107 S.Ct. 895, 93 L.Ed.2d 847 (1987)). Likewise, an evidentiary objection based upon prejudice will not preserve ER 404(b) review. *Frederick*, 45 Wn. App. at 634.

Here, the issue of whether the trooper's testimony as to the straw and mirror was in violation of ER 404(b) was not preserved at the trial court. Upon review of the record, no ER 404(b) objection was ever made. The Appellant filed a motion in limine to exclude the trooper from testifying about his observations of the straw found on the Appellant's person and the mirror found inside of the vehicle the Appellant was driving. 1RP at 126-130. The only objection that was made in reference to this evidence was relevance and prejudice. 1RP at 134. The Appellant did not raise an ER 404(b) objection to this evidence; therefore, this issue was not properly preserved for review and the State requests the Court not address the merits of this argument.

B. THE APPELLANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL.

Review of a trial court's evidentiary rulings is done under the abuse of discretion standard. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). ER 404(b) requires evidence to be relevant to a material issue, and the trial court must weigh the potential probative value and prejudicial effect of the evidence on the record. *Id.* at 831-32. Evidence may be admissible if its purpose is to show motive, intent, preparation, plan, or knowledge. *State v. Pogue*, 104 Wn. App. 981, 984-85, 17 P.3d 1272 (2001).

In addition to the exceptions identified in ER 404(b), our courts have previously recognized a “res gestae” or “same transaction” exception, in which “evidence of other crimes is admissible ‘[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’”

Lane, 125 Wn.2d at 831 (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)(quoting *McCormick's Evidence* § 190, at 448 (Edward W. Cleary gen. ed., 2d ed. 1972)).

Here, the evidence showed that the trooper located a prescription pill bottle in Mr. Coury’s name on the Appellant’s person. The pill bottle contained 89 of the 90 pills of Oxycodone prescribed. 2A RP at 197-98. After finding Mr. Coury’s prescription pill bottle on the Appellant’s person, the trooper also located a cut straw inside one of the Appellant’s pockets. 2A RP at 200. The trooper observed a white residue within the straw. *Id.* After being granted consent, the trooper then searched the Appellant’s vehicle and located a mirror. *Id.* at 202. The trooper observed the mirror had cut line and white powder on the lines. *Id.* The trooper testified that the cut straw and mirror were items that he has previously seen used in the ingestion of drugs. *Id.* When the Appellant was confronted with the pills, the straw, and the mirror, he told the trooper that “he knows that he is taking more pills than he should and that he is addicted to them.” 2A RP at 203-04. The trial court ruled that this

evidence was admissible because it was relevant to the issue of the Appellant's possession. IRP at 141.

The straw and mirror were not offered to show the Appellant's propensity to unlawfully possess controlled substances; instead, it was used to contradict his assertion that he was in unwittingly possession. The Appellant claimed that he did not know he was in possession of Mr. Coury's pills, despite the fact that he found them in his bag and then personally placed the pills in his own pocket. This evidence provided the jury with a complete picture of the Appellant's possession of the controlled substance because it specifically referenced items that would normally be used in the possession and consumption of the substance that was charged.

Furthermore, if this court decides that the trial court improperly admitted this evidence, any error by doing so was harmless. Even without the straw and mirror, the jury heard direct testimony from the officer and Appellant that he was in actual possession of Mr. Coury's Oxycodone without legal authorization. The jury considered the Appellant's argument that his possession was unwitting and did not find it credible. Therefore, the Appellant was not denied his right to a fair trial.


V. CONCLUSION

As stated above, the Appellant's appeal should be denied. The Appellant did not make an ER 404(b) objection at trial; therefore, the Court should not consider the merits of that argument. If this argument is evaluated, the evidence was not admitted in violation of ER 404(b) because it was the res gestae of the Appellant's possession

Respectfully submitted this 21 day of August, 2012.

SUSAN L. BAUR
Prosecuting Attorney

By:



SEAN BRITTAIN
WSBA 36804
Attorney for Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Lisa E. Tabbut
Attorney at Law
P.O. Box 1396
Longview, WA 98632
Lisa.tabbut@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 27th, 2012.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 27, 2012 - 1:47 PM

Transmittal Letter

Document Uploaded: 429217-Respondent's Brief.pdf

Case Name: State of Washington v. Ronnie D. Strode, Jr.

Court of Appeals Case Number: 42921-7

Is this a Personal Restraint Petition? ☐ Yes ☒ No

The document being Filed is:

- ☐ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: _____
- ☐ Answer/Reply to Motion: _____
- ☒ Brief: Respondent's
- ☐ Statement of Additional Authorities
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

Lisa.tabbut@comcast.net